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Supreme Court of the United States

October Term, 1946.

No. 81.

Securities and Exchange Commission, *Petitioner*,

v.

Chenery Corporation, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS CHENERY CORPORATION, ET AL.

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OPINIONS BELOW.

The opinion of the Court below (172-179)* is reported in 80 U. S. App. D. C. 365, 134 F. (2d) 6. The findings and opinion of the Commission (128-169) are S. E. C. Holding Company Act Release No. 5584. The prior opinions in this matter on a previous review are contained in 8 S. E. C. 893; 10 S. E. C. 200; 75 U. S. App. D. C. 374, 128 F. (2d) 303; and 318 U. S. 80 (98-117).

* References in parentheses are to pages of the printed record unless otherwise indicated.

JURISDICTION.

The judgment of the Court of Appeals was entered February 4, 1946 (181). The petition for writ of certiorari was filed April 8, 1946, and was granted May 13, 1946 (184-185). This Court appears to have jurisdiction under Section 240(a) of the Judicial Code, as amended, which is made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935.

STATEMENT OF CASE.

Original Proceedings Before the Commission.

Federal Water Service Corporation, a Delaware Corporation (hereinafter called Federal), was a holding company owning securities of subsidiaries which operated water, gas, electric and other properties. November 8, 1937, Federal registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, and filed with the Commission, under Section 7 of said Act and the rules of the Commission, an application for a report on a plan of reorganization, and declarations regarding the alteration of rights of holders of outstanding securities and the solicitation of consents. The application and declarations set forth a plan for the voluntary reorganization of Federal, to be accomplished by amendment to its certificate of incorporation pursuant to Section 26 of the Delaware Corporation Law, and by a reduction in its capital pursuant to Section 28 of the Delaware Corporation Law. At the time of the filing of the application and declarations, Federal had outstanding six classes or series of stock: $7, $6.50, $6, $4 series preferred stock, Class A stock and Class B stock. Dividends in arrears had accumulated on all series of preferred stock and upon the Class A stock. Federal had valuable assets and had substantial annual net income, but, by reason of earlier losses and depreciation in the value

of investments, the corporation had a capital deficit which under Delaware law prevented the payment of dividends. The plan contemplated the simplification of the corporate structure and the elimination of the capital deficit by a reduction of capital, so that the corporation might resume the payment of dividends. (40, 41, 131-135)

The Commission objected to the plan first proposed, new plans were filed, and continued discussions were had with representatives of the Commission toward the development of a plan which the Commission would permit to become effective under the Public Utility Holding Company Act of 1935, which would comply with the law of Delaware as to the rights of holders of preferred stock to arrears of dividends, and which would also command the necessary consent of the stockholders of Federal as required by Delaware law. After the decision on January 16, 1940, in *Havender v. Federal United Corporation*, 11 A. (2d) 331,* which established that under Delaware law preferred stock together with dividends in arrears thereon might be converted into new securities through a merger, Federal filed with the Commission on March 30, 1940, amendments to its application and declarations, setting forth a new plan of reorganization by way of merger. The amendments proposed the merger into Federal of two other Delaware corporations, Utility Operators Company and Federal Water and Gas Corporation. Utility Operators Company, the stock of which was largely owned by officers and employees of Federal and its subsidiary companies, owned all of the Class B stock of Federal. Federal owned all of the stock of Federal Water and Gas Corporation. Utility Operators Company and Federal Water and Gas Corporation also filed with the Commission declarations regarding the alteration of the rights of the holders of their securities in

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* For a discussion of the Delaware cases as showing the problems faced by the directors of Federal during the period in which the plans were submitted to the Commission, see *Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine*, 55 Harv. L. Rev. 71.

accordance with the proposed merger agreement. (136, 137).

During the period from November 8, 1937, to June 30, 1940, the respondents purchased preferred stock in Federal in amounts as follows:

Name	Shares $6.00 Preferred	$6.50 Preferred	$7.00 Preferred
Chenery Corporation	3860	3547	1211
H. M. Erskine	25	50	——
R. H. Neilson	10	——	——
W. A. Culin	50	110	——
F. T. Tansill	——	65	——
H. D. McHenry	——	75	15
T. H. Wiggin	50	30	——
C. M. Chenery	150	170	——
J. N. Greene	45	——	——
H. G. Calder	——	40	——
C. P. Rather	110	310	——
Wm. E. Matthews, III	——	65	——
C. van den Berg, Jr.	25	1535	140
W. R. Edwards	100	——	——
Watson Dark	5	160	60
E. C. Deal	85	——	——
F. R. Harris	130	173	40
E. C. Elliott	27	——	——
Total purchased by respondents	4672	6330	1466

A comparison of these purchases with the total stock transferred during the period and the total stock outstanding in each class is:

	$6.00 Preferred	$6.50 Preferred	$7.00 Preferred
Total outstanding	71,706	69,888	15,296
Transfers during period from January 1, 1938, to June 30, 1940*	69,578	61,595	12,919
Purchased by respondents during period from November 8, 1937, to June 30, 1940	4,672	6,633	1,466

The only sales of this stock by respondents during the period were: C. M. Chenery sold 125 shares of the $6.00 preferred stock and 20 shares of the $6.50 preferred stock, and C. van den Berg, Jr., sold 25 shares of the $6.00 preferred stock and 700 shares of the $6.50 preferred stock. (79-83).

When these purchases were made the respondents other than Chenery Corporation were officers or directors of Federal or of Utility Operators Company. Chenery Corporation was a family holding company which had nine stockholders, of whom two, who owned approximately 47 per cent of the stock of Chenery Corporation, were officers or directors of Federal or Utility Operators Company. All of these purchases and sales of stock in Federal were currently reported to the Commission by the purchasers as required by Section 17 of the Public Utility Holding Company Act of 1935. (35, 138).

June 29, 1940, the Commission issued tentative findings in which the question was raised for the first time whether the preferred stock which had been purchased by officers and directors of Federal and Utility Operators Company

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* This does not include transfers from November 8, 1937, to December 31, 1937, inclusive, since the evidence only gave that year as a whole. It is an interesting coincidence that during the period in question an amount of stock changed hands which was approximately equal to the total amount outstanding. Respondents purchased something less than 9 per cent of the stock sold.

and by Chenery Corporation while plans of reorganization were pending before the Commission should be treated on any different basis than other preferred stock. Hearings were had on this question, and C. T. Chenery, the President of Federal, testified that he had advised the purchases of preferred stock of Federal by the Chenery Corporation and by the individual officers and directors, because he believed that the preferred stock was a very good investment, and because by its purchase the management could maintain a voting interest if the B stock should be eliminated.* The testimony also showed that full information in regard to the corporation had always been given to the stockholders and to the public. (47, 49, 50).

In its present decision, the Commission quotes Mr. Chenery's testimony as to the reason for these purchases as follows:

> "Chenery Corporation purchased it on my advice. [illegible] have felt, have testified, and have told everyone who has asked me over the past years that I thought that preferred stock of Federal Water Service Corporation, over a long period of time, was sufficiently sound so that it would again pay dividends and that this would be true whether any plan of reclassification was consummated or not, that there were inherent values in the Corporation which would be reflected in the stock and that if no plan of reclassification were put through, that the accumulation of the earnings over a period of time would be sufficient to cure the deficit and dividends would again be resumed.
>
> "Also, the officers and employees of this Corporation bought the B stock in 1932 at my suggestion and on my advice and paid approximately $600,000 for it,

* The position of the company had been that it could not put through a voluntary plan of reorganization without the consent of the Class B stock, and that it was not unfair or inequitable to recognize the voting power of the Class B stock in some small way, as that stock was being asked to consent to a modification of its contractual rights. The Commission, however, finally insisted upon the elimination of the B stock, and it was not included in the plan which was ultimately approved.

contracted to pay more.* The situation of the Corporation since that time has improved substantially. This B stock was bought by all classes of employees. I think more than 99 per cent of officers and employees bought it and paid for it by deductions from their salaries over a three or four-year period.

"The original plans for reclassification contemplated that the B stockholders would be given an opportunity to buy their way back in the Corporation, first by giving them a special stock which was convertible into new common stock upon the payment of cash and which maintained their voting power over a period of years; second, by giving them options so that it was all the time contemplated that these people who held this Corporation together by contributions from their salaries and wages should not be thrown out. I have always regarded the ownership of this stock by the employees of the Corporation as one of the great assets of the Corporation.

"Then the view shifted and apparently the feeling was that little consideration should be given to the B stock and finally that none should be given to it. The voting control of the B stock was thrown into the open market for anybody to pick up who desired it. I had knowledge first that the preferred stock was freely traded on the market, that there were any number of investment bankers buying and selling it constantly and secondly, that strong financial interests were accumulating substantial blocks of this stock.

"As long as we thought that a plan would be worked out which would give the B stock an opportunity to come back in the future, my suggestion was to those stockholders, and I think I testified to this effect at the first hearing here in 1937, that they should save so that at the expiration or at the end of the period, they would be in a position to exercise the option and acquire that stock. Then when it became apparent that this was not to be, a meeting was held of the B stockholders and it was their decision that they would contest any plan which worked them out completely and the suggestion was made that it would be wise to purchase such pre-

* Mr. Chenery refers to the purchase of B stock by Utility Operators Company, the stock of which was taken in large part by officers and employees of the system (132).

ferred stock as they reasonably could so that in the event that there was litigation and the plan was not worked out and that finally it should be held that the B stock was not entitled to anything, that these men who had held this Corporation together and who were its loyal servants would still have some position in the Corporation, some voice.

* * * * * * * * * *

"* * * I wanted the employees if they lost the B stock to have some secondary line of defense, which I thought would be in the ownership of the preferred stock, and I said it was my view that it was sound policy for every person in the employ of the company who could spare the money to buy such preferred stock as they could carry, and that I would buy all that I could, through the Chenery Corporation.

"Many of them did buy such preferred stock. In some cases groups got together and borrowed money from the bank to be paid over a period of time with which to buy this preferred stock.

"In the case of Chenery Corporation, we liquidated dividend-paying securities at a loss in order to buy this stock.

"The pendency of the plan, the time of the plan, had nothing to do with it. When we could sell this stock and buy up Federal preferred on pre-determined ratios, the orders to the brokers were to sell the other stock and buy Federal preferred.

"Now I take full responsibility for the purchase of stock by officers and employees. I not only thought it was a sound thing for them to do, I thought it was highly desirable, not only from their viewpoint but from the viewpoint of the corporation, and I so expressed that opinion. I also said that I thought that the stock was inherently sound, that over a period of time, whether we had a plan or did not have a plan, that they wouldn't have any loss in the stock." (141-144).

The successive plans for reorganization as filed from time to time with the Commission were available to the public, including all stockholders, as were all financial reports filed with the Commission. Mr. Culin, the treasurer of Federal, testified that the management had always been very free in

giving information to everyone who asked for it. Annual reports of the company gave full information, quarterly earning statements were published in the financial pages of the newspapers, the newspapers carried reports of the plans before the Commission from time to time, and various investment houses also gave information and advice with respect to the stock. (50).

Mr. Chenery testified:

> "* * * my feeling has been that if there is one corporation that has ever operated in the full blare of publicity, that this one is it. It was one of the first corporations to start and give full and complete details of every transaction. Standard Statistics has given reports at three-month intervals. There have been a dozen brokerage houses which have circularized preferred stockholders consistently, telling them of every development and plan and advising them what to do. Our own policy has been not to refuse any stockholder any information at any time. There is no record since we have been in control of the company since March 14, 1932, of our having refused any stockholder any information on any subject." (54, 55).

Stock of Federal was sold in the over-the-counter market, and its quotations appeared daily in New York newspapers. All of the purchases in question were made in the open market, except in one instance when Chenery Corporation acquired 2700 shares of 6½ per cent preferred from the investment house of Ingalls & Snyder in exchange for $100,000 principal amount of Federal debentures. Mr. Ingalls testified that his firm had full knowledge of the facts relating to Federal, and that

> "* * * today I am very much delighted we made the trade, * * * it's been a most satisfactory trade." (58).

Mr. Ingalls also testified that he knew that officers and directors of Federal or Utility Operators had been purchasing the preferred stock during the three or four years before he sold his stock. (59).

The present findings of the Commission are that the petitioners paid $328,347 for all the preferred stock in question and that they stood to receive new common stock "having a par value and probable market value of approximately $395,385."* (139 *f.n.*)

March 24, 1941, the Commission filed formal findings and an opinion in the proceeding. The plan then under consideration had contemplated the conversion of the four classes of preferred into new common stock. The Commission stated that the plan could not be approved in so far as it provided for participation of the preferred shares purchased by officers or directors of Federal or Utility Operators Company, or by the Chenery Corporation, after November 8, 1937, on a parity with other shares of preferred stock of the same class. The Commission held that the officers and directors were "trustees" who had purchased trust property, that they must account for any profit on such purchases and that

> ". . . honesty, full disclosure and purchase at a fair price do not take the case out of the rule."

Entry of an order was deferred, and it was stated that further consideration would be given to the matter if Federal filed amendments to its proposed plan designed to cure this and other alleged defects therein. (8 S. E. C. 893).

Thereafter amendments to the declarations and applications were filed by the corporations, in order to present a plan which complied with the findings and opinion of the Commission. The proposed merger agreement was amended to provide among other things that no shares of common stock of the surviving corporation should be issued for the shares of preferred stock of Federal purchased

* To the extent that this approximate figure may be indicative, the increase represents no more than ordinary market fluctuations during a period of several years, or, as the Court of Appeals pointed out, "a difference little more than the amount of interest lost in holding the preferred shares pending completion of the plan" (173).

since November 8, 1937, by Chenery Corporation or by the individual petitioners when they were officers or directors of Federal or of Utility Operators Company, but that each such purchaser should receive upon surrender of such stock to the surviving corporation the cost of such stock with interest at 4 per cent per annum from the dates of its purchase to the effective date of the merger agreement. It was further provided in effect that the respondents should account to the surviving corporation for any profit realized on any such stock as had been sold by them. (145).

August 15, 1941, the respondents filed an application for leave to intervene in the proceedings before the Commission, and objected to the approval of any plan of reorganization containing a provision to the effect that the preferred stock purchased by the respondents should be treated on a less favorable basis than other preferred stock of the same class. August 18, 1941, the respondents were given permission to intervene and were made parties to the proceeding with leave to file a brief. (86, 97, 145).

September 24, 1941, the Commission made a report on the amended plan of reorganization, entered supplemental findings and opinion, and issued an order permitting the declarations, as amended in conformity with the Commission's opinion of March 24, 1941, to become effective, and granting the applications as amended. The effect of this order was to deny the prayers contained in the intervening petition and brief of the respondents. (10 S. E. C. 200).

First Judicial Review.

October 22, 1941, these respondents filed a petition in the United States Court of Appeals for the District of Columbia for review of the order of the Securities and Exchange Commission of September 24, 1941, and prayed that the order be modified or set aside to the extent necessary to treat these petitioners on the same basis as other holders of preferred stock of Federal of the same class.

April 27, 1942, that court entered its opinion in the case. *Chenery Corporation* v. *Securities and Exchange Commission*, 75 U. S. App. D. C. 374, 128 F. (2d) 303. The court stated in regard to the purchases,

> "The Commission's brief and argument in this court explicitly declare that the conclusion to outlaw this stock is not 'predicated on any finding that petitioners defrauded or failed to make the fullest disclosure to the stockholders from whom they purchased the shares in question.' On the contrary, the Commission, very properly, admits that the transactions complained of were consummated without 'any ulterior purpose' and equally without any intention to profit personally 'in the consummation of the plan through having traded while the proceedings were pending'. We have, therefore, a case in which the facts are agreed, the good faith of petitioners admitted, and the decision based squarely on the assumption that the purchase of securities of a corporation by its officers or directors for their own account, pending action on an application for approval of a merger, is 'detrimental to the public interest' as that phrase is used in Section 7(d) (6) of the Act." (p. 377).

The court said further:

> "* * * it is admitted that there was a full and free disclosure before any purchases were made, the exercise of the utmost good faith throughout, * * * " (p. 379).

It was held that no statute, regulation, or rule of common law or equity proscribed such purchases of stock, that Congress in enacting the Public Utility Holding Company Act of 1935 had never intended to proscribe an investment made under these circumstances, and that the action of the Commission was equivalent to retrospective legislation. The order of the Commission was therefore reversed.

July 25, 1942, the Securities and Exchange Commission filed a petition for certiorari in this Court, and certiorari was granted October 12, 1942.

February 1, 1943, this Court entered its opinion in the case. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 87 L. Ed. 626. In finding "that the Commission's order cannot be sustained," this Court said:

> "* * * The Commission dealt with this as a specific case, and not as the application of a general rule formulating rules of conduct for reorganization managers. Consequently, it is a vital consideration that the Commission conceded that the respondents did not acquire their stock through any favoring circumstances. In its own words, 'honesty, full disclosure, and purchase at a fair price' characterized the transactions. The Commission did not suggest that, as a result of their purchases of preferred stock, the respondents would be unjustly enriched. On the contrary, the question before the Commission was whether the respondents, simply because they were reorganization managers, should be denied the benefits to be received by the 6,000 other preferred stockholders. Some technical rule of law must have [illegible]d the Commission to single out the respondents a[illegible]eny their preferred stock the right to participate equally in the reorganization." (103).

The Court held that the "cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order" and said

> "* * * Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter. Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions unconcerned with the fairness of a par-

ticular transaction. But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11 (e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicity disavowed by the Commission." (108-109)

The case was remanded to the Court of Appeals with directions to remand it to the Commission for such further proceedings, not inconsistent with the opinion, as might be appropriate. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 87 L. Ed. 626. April 5, 1943, the Court of Appeals issued an order on the mandate of this Court directing that the order of the Securities and Exchange Commission be set aside and remanding the cause to the Commission for such further proceedings, not inconsistent with the opinion of this Court, as might be appropriate.

Subsequent Proceedings Before the Commission.

Meanwhile the merger contemplated by the Commission's order of September 24, 1941, had been completed according

to the plan thereby approved, with a provision that no shares of common stock of the surviving corporation should be issued for shares of preferred stock of Federal purchased by the respondents during the reorganization proceedings. In view of the decision by the Supreme Court, Federal Water and Gas Corporation, the surviving corporation, on April 7, 1943, filed an application and declaration asking leave to submit to its stockholders resolutions providing for an amendment and correction of the merger agreement, and for an amendment and correction of the certificate of reduction of capital, so as to permit the issue of stock in the surviving corporation to these respondents on a parity with other preferred stockholders. On the same day these respondents also filed a motion asking that such further proceedings be had as might be necessary to treat them on the same basis as other holders of preferred stock of Federal of the same class, and thereafter filed a brief urging that the application filed by the corporation be approved. The matter was argued orally before the Commission on the existing record. No new evidence was introduced. (118, 127, 129.)

February 7, 1945, the Commission entered an order denying the application of Federal Water and Gas Corporation to amend the plan of reorganization,* and ordering that the plan of reorganization theretofore approved by the Commission's order of September 24, 1941, and the transactions contemplated by said plan be reapproved as of September 24, 1941. The effect of this order of February 7, 1945, was to deny the motion of the respondents that they be treated on the same basis as other holders of preferred stock of Federal of the same class. With its order of February 7, 1943, the Commission filed a statement of facts and conclusions in which the Commission stated as the basis of its decision:

* An order denying the application had theretofore been entered on April 17, 1944, but was withdrawn by the Commission.

"As we understand the opinion of the Supreme Court, our determination of 1941 in this case was held to be unsupported by certain equity precedents on which we relied. And as we construe the Supreme Court's mandate we are directed to re-examine the case and to decide on the facts, viewed in the light of that conclusion of the Court, whether our special experience in administering the legislative policy of the Act indicates a necessity for reaffirming our previous determination or whether, instead, our earlier ruling should be modified." (130).

The decision of the Commission was that its previous determination should be reaffirmed. The Commission held that the plan, if amended, would not be "fair and equitable to the persons affected thereby" within the meaning of Section 11 (e) of the Act, that it would involve the issuance of securities on terms "detrimental to the public interest and the interest of investors" forbidden by Sections 7 (d) (6) and 7 (e) of the Act, and that it would "result in an unfair and inequitable distribution of voting power" within the meaning of the latter section. The Commission stated:

"We are led to this result not by proof that the interveners committed acts of conscious wrongdoing but by the character of the conflicting interests created by the interveners' program of stock purchases carried out while plans for reorganization were under consideration." (149).

* * * * * * * * *

"As we have already indicated, the personal integrity of these particular interveners is not a question at issue in this case." (163).

Second Judicial Review.

On March 22, 1945, these respondents again filed a petition in the United States Court of Appeals for the District of Columbia, this time asking for review of the order of the

Commission of February 7, 1945. The respondents again prayed that the order be modified or set aside to the extent necessary to treat them on the same basis as other holders of preferred stock of Federal of the same class (2).

The Court of Appeals again reversed the order of the Commission, this time saying:

> "The Commission's position actually amounts to neither more nor less than a definite holding that purchases of stock of a corporation in process of reorganization are unlawful, when made by officers or employees of the corporation—and this without regard to any factor of good or bad faith, or any other factor which might impute special knowledge, secret information, or indeed anything tending to show a lack of bona fides in the transaction. For, as we have seen, the Commission expressly says the integrity of interveners in the respects in which they acted is not at issue. And as to this latter statement, in passing, we may properly observe that it cannot be, for the Commission has put that issue out of the case by its previous admission of the same facts that 'honesty, full disclosure and purchase at a fair price' characterized the transactions. In practical effect, therefore, the Commission now insists upon doing precisely what the Supreme Court said it could not do; that is to say, in applying to this specific case a standard which has never been promulgated, either by the Commission in its regulations or by legislative act, and which the Commission says can not fairly be generally applied." (176, 177).
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> * * * * * * * * * *
>
> "In nothing we have said do we wish to be understood as expressing any opinion as to the right of the Commission under its broad powers to promulgate a rule of general application forbidding officers and directors of a corporation in process of reorganization from buying—and perhaps also from selling—securities of the corporation during the pendency of proceedings before the Commission. That question is not present in this case. What we do say is that, without such a rule, of which notice is given so that all may know of its existence, transactions in themselves fair and

just and honest and in accord with traditional business practices, and which 'Congress itself did not proscribe,' and which 'judicial doctrines do not condemn,' may not properly be 'outlawed or denied' their ordinary effect." (180).

SUMMARY OF ARGUMENT.

The decision of this Court on the former review of this case was that no statute, judicial doctrine, or rule of the Commission precluded the respondents, as officers and directors of Federal and Utility Operators, from purchasing stock in Federal during the period while successive plans of reorganization were pending before the Commission. The opinion pointed out that the record was "utterly barren" (109) of any showing of misuse by the respondents of their position as reorganization managers. It was held that the former decision of the Commission, denying participation to the respondents on the same basis as other stockholders, could not be sustained (111). *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 318 U. S. 80.

Now the Commission has "reaffirmed" its former decision on exactly the same record. No additional testimony has been taken. The Commission disavows the existence of any proof of "conscious wrongdoing" (149), and, as before, the Commission bases its decision solely on "the character of the conflicting interests" (149). The only difference between the decisions is that the former decision was based on an erroneous conception of equity while the present decision is based on a conception of the Commission's administrative powers which we contend is equally erroneous.

We contend that the Commission's present order, denying equal participation to the respondents, is not supported by evidence or even by the findings of the Commission, and that it is wholly arbitrary. It is based not upon facts, but upon "doubts" (149).

We contend that any power in the Commission to resolve problems of policy is legislative in its nature and should be exercised by the promulgation of regulations, prospective in their operation, which will serve as a fair warning to such persons as may come within their provisions.

This retroactive order of the Commission would, in fact, deprive the respondents of property without due process, since an important attribute of their stock is the contractual right to be treated on a parity with other stockholders. Whether the Commission purports to act in an administrative, legislative, or judicial capacity, we contend that it has no power under the statute to enter an order the effect of which is to change existing law in such a way as to deprive the respondents of normal property rights.

ARGUMENT.

1.

The Record, Findings, Decision and Order Are Essentially the Same as on the Prior Review.

By the order entered February 7, 1945, and now under review:

1. The Commission denied an application to amend the plan of reorganization to treat stock of these respondents on the same basis as other preferred stock (170).

2. The Commission reapproved its order of September 24, 1941, which treated the stock of these respondents on a different basis from other stock (170).

In its effect, the order entered by the Commission on February 7, 1945, is exactly the same as the order entered on September 24, 1941.

The record on which the order of February 7, 1945, is based is exactly the same as the record on which the order of September 24, 1941, was based. No additional evidence

was introduced on behalf of the Commission, or on behalf of any of the parties to the proceeding. Although two hearings were had before the Commission, these involved only the presentation of argument by counsel on the record already existing.

The Commission's findings have been completely rewritten, but there is no material change in the facts as found. It is true that the Commission has attempted to avoid the effect of its former concession of good faith, but the Commission has made no finding to the contrary. In its decision in 1941, the Commission had held that the respondents were "trustees" who had purchased trust property, that they must account for any profit on such purchases, and that

> "* * * honesty, full disclosure and purchase at a fair price do not take the case outside the rule." (8 S. E. C. 893, 916-7)

The position of the Commission at that time was stated by the Court of Appeals as follows:

> "The Commission's brief and argument in this court explicitly declare that the conclusion to outlaw this stock is not 'predicated on any finding that petitioners defrauded or failed to make the fullest disclosure to the stockholders from whom they purchased the shares in question.' On the contrary, the Commission, very properly, admits that the transactions complained of were consummated without 'any ulterior purpose' and equally without any intention to profit personally 'in the consummation of the plan through having traded while the proceedings were pending.'
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> * * * * * * * * *
>
> "* * * it is admitted that there was a full and free disclosure before any purchases were made, the exercise of the utmost good faith throughout." *Chenery Corporation v. Securities and Exchange Commission*, 128 F. (2d) 303, 306, 308.

And this Court said:

> "* * * The Commission's determination can stand, therefore, only if it found that the specific transactions

under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. *The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commission"* (109). *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 93 (Italics ours).

Now, however, the passage of more than three years and change in membership has dulled the Commission's original perception of the good faith of these respondents. In its opinion of February 7, 1945, the Commission now says that it never made a finding of "honesty, full disclosure and purchase at a fair price," and that this Court was mistaken in that regard (164, *f.n.*). The Commission makes no finding on this point, and states its present position as follows:

> "As we have already indicated, the personal integrity of these particular interveners is not a question at issue in this case. For obvious reasons we do not conceive it our function to try to guess whether a reorganization manager, faced with a choice of conducting the reorganization for the accomplishment of his own objectives or for the benefit of security holders generally, is the kind of man who would be likely to take one course and not the other." (163).

On this review therefore, as before, there is "a record utterly barren of any showing" that these respondents "misused their position" or "that they took advantage of the corporation, the other stockholders or the investing public". While the Commission has not again "explicitly disavowed" such a claim, it has made no adverse finding on the point. The respondents are the same as when the case was here before, and the same acts by them are again under review, upon exactly the same record.

The decision of the Commission of September 24, 1941, was that stock which was acquired by these respondents during a period in which successive reorganization plans

were before the Commission should not be permitted to participate in the reorganization on an equal footing with other stock of the same class. The decision of the Commission of February 7, 1945, now under review is exactly the same. In fact the Commission's original order was "re-approved" (170).

2.

The Commission Has Misinterpreted the Decision of This Court.

The only differences in the Commission's two decisions are in the reasons advanced therefor. In the decision of September 24, 1941, the Commission professed to decide the case according to principles applied by courts of equity. The present decision professes to be based on the "special experience" of the Commission. The Commission now undertakes to decide the case on the following theory:

> "As we understand the opinion of the Supreme Court, our determination of 1941 in this case was held to be unsupported by certain equity precedents on which we relied. And as we construe the Supreme Court's mandate we are directed to re-examine the case and to decide on the facts, viewed in the light of that conclusion of the Court, whether our special experience in administering the legislative policy of the Act indicates a necessity for reaffirming our previous determination or whether, instead, our earlier ruling should be modified." (130).

We respectfully submit that this construction of the former opinion is wholly erroneous. The Commission ignores the following decisive language of this Court:

> "* * * But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized

to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by Sec. 11(e), promulgated new general standards of conduct. * * *"

Let us examine this language word by word, so that there may be no question as to its meaning:

> "before transactions otherwise legal can be outlawed or denied their usual business consequences"

Clearly that means that before the purchases of stock by these respondents, which the Court ultimately found were "otherwise legal", could be outlawed (as had been done by Commission's decision) or denied their usual business consequences (as had been done by the Commission)

> "they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority."

Note the use of the word "prescribed", derived from "*prae*" before, and "*scribere*" to write, that is "written before."

> "Congress itself did not proscribe the respondents' purchases of preferred stock in Federal."

This clearly means that the statute itself did not forbid the purchases by these petitioners.

> "Established judicial doctrines do not condemn these transactions."

This is clear enough.

> "Nor has the Commission, acting under the rule-making powers delegated to it by Sec. 11 (e), promulgated new general standards of conduct."

This certainly is clear. Section 11(e) of the Public Utility Holding Company Act of 1935 provides:

> "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission * * *."

In the opinion there were at least three references to the rule-making powers of the Commission. Thus the Court said,

> (1) "The Commission dealt with this as a specific case, and not as the application of a general rule formulating rules of conduct for reorganization managers." (103).
>
> (2) "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different." (108).
>
> (3) "Nor has the Commission, acting under the rule-making powers delegated to it by Sec. 11(e), promulgated new general standards of conduct." (109).

Certainly this language, used three times, could not have been "merely illustrative", as is now suggested by counsel for the Commission (brief p. 19).

The language of this Court in that opinion is just as applicable now as it was then. The purchases made by the respondents do not "fall under the ban" of any "standards of conduct prescribed by an agency of government." And it is impossible for the Commission to bring them under any such ban, for when the purchases were made they were not forbidden by any act of Congress, nor by established judicial decisions, nor by any rule promulgated by the Commission.

3.

The Commission's Order is Not Supported by the Findings of Fact or by the Evidence. It is Wholly Arbitrary.

The application and declaration of Federal Water and Gas Corporation were filed under Section 7 (a) of the Act, and under Section 7 (d) (6) and 7 (e) thereof the Commission "shall permit" such a declaration to become effective unless the Commission finds that it "will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant, or is otherwise detrimental to the public interest or the interest of investors or consumers." In making its decision the Commission is also permitted to apply the standards of Section 11 (e) of the Act and to determine whether the plan is "fair and equitable." (107). These were the "statutory questions" which the Commission purported to resolve. (147).

The Commission, however, cannot be arbitrary in making its decision. Its determination must be a reasonable one, based on findings of fact, and these findings of fact must be supported by evidence. As the Commission admitted in this case, the statutory questions must be considered "in the light of the record before us." (147)

In the present case the error lies in the complete absence of any findings or evidence on which the Commission's order can reasonably be based.

The decision of the Commission reduced to its simplest terms is this:

Finding: The respondents were officers and directors of Federal and of Utility Operators. During the period when successive plans were under consideration by the Commission, the respondents purchased preferred stock of Federal.

Conclusion: Because conflicting interests subjected the respondents to temptation, the preferred stock so purchased by them should not be allowed to participate in the reorganization on an equal basis with other stock of the same

class, but should be surrendered to the corporation at cost plus four per cent.

The Commission has suggested that while a reorganization is under consideration the management has an opportunity to manipulate the reorganization and to influence the market for its own gain, but the Commission has made no finding that anything of the sort was done in this case.

The Commission has suggested that "doubts * * * remain unresolved" (149). But there is no doubt what the evidence is, and there is no conflict in the evidence. The reasons which prompted the respondents to purchase the stock are set forth in the Commission's findings, and have been quoted in this brief (pp. 6-8). They were fair and honest reasons. The Court of Appeals summed up the situation as follows:

> "Accordingly, we had then, as we have now, a case in which there is not one jot or tittle of evidence tending to contradict petitioners' declared purpose in the purchase of preferred stocks to be the transfer of their interest from one class, declared by the Commission to be worthless, to another with voting rights, in order that to some extent they might make, as they thought, a safe investment and at the same time preserve some interest in a company to which they had devoted a considerable part of their business lives." (174)

When the case was here before this Court said,

> "The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing." (109).

The record is still utterly barren of any such showing. No additional evidence has been introduced. The Commission has not found, and there is no evidence to warrant a finding, that the respondents took advantage of the corporation,

the other stockholders, or the investing public. On the contrary, all of the evidence is to the effect that their reasons for purchasing the stock were legitimate,* and that the respondents were fair and open in all their dealings.

Nevertheless the Commission held,

> "*Ultimate Conclusion*
>
> "* * * we are unable to find that the plan if amended as proposed would be 'fair and equitable to the persons affected thereby' within the meaning of Section 11(e) of the Act. It is our view that the plan so amended would involve the issuance of securities on terms 'detrimental to the public interest and the interest of investors' forbidden by Sections 7 (d) (6) and 7 (e) of the Act, and would result in an unfair and inequitable distribution of voting power within the meaning of the latter section. Thus we are unable to approve the amended plan." (149).

We contend that this conclusion is not supported by any evidence, or even by the Commission's findings. Why would it not be "fair and equitable to the persons affected thereby" to treat the preferred stock purchased by these respondents during the period of reorganization on the same basis as preferred stock held by others? Why would it be "detrimental to the public interest and to the interest of investors" to do so? Why would it result in an unfair and inequitable distribution of voting power? We have looked in vain for any evidence, or even for any finding of fact, which supports these conclusions.

The Commission has not found as a fact that these respondents depressed the market price of the stock in order to make favorable purchases, and there is no evidence on which the Commission could have made such a finding. The purchases were in the open market at market prices (58), and would tend rather to support the market than to de-

* This Court observed on the last review that "The respondents frankly admitted that their purpose in buying the preferred stock was to preserve their interests in the company" (101).

press it. There is no evidence of dissatisfaction on the part of any seller. One large seller in fact stated affirmatively that he was "delighted to make the trade" and that it had been "most satisfactory" (58).

Nor did the Commission find that there was anything about the character of these respondents from which a conclusion could be drawn that it was "in the public interest or the interest of investors" to bar them from exercising voting power in the corporation. On the contrary the Commission has stated that "the personal integrity of these particular interveners is not a question at issue" (163).

The Commission states the following as the basis for its decision:

> "We are led to this result not by proof that the interveners committed acts of conscious wrongdoing, but by the character of the conflicting interests created by the interveners' program of stock purchases carried out while plans for reorganization were under consideration." (149).

Thus the Commission's decision does not even purport to be based on the facts of this case, but constitutes rather the establishment of a new legal standard of conduct and its application to transactions completed some years ago. In spite of the decision of this Court, the Commission still contends that equitable principles relating to trustees of express trusts require the promulgation of such a standard.*

In reversing the order of the Commission the Court of Appeals said,

> "Certainly, a reasoned conclusion must be based on evidence, and may not be pitched alone on unresolved doubts, nor upon weaknesses or selfishness which the Commission believes is inherent in human nature. The

* See footnote to Commission's present decision in which the Commission, likening itself to a court of equity, quotes at length from Lord Eldon's decision as to trustees in *Ex parte Lacey*, 6 Vesey 625, 626a, 628 (1802) (160).

construction advanced by the Commission would permit it to exercise a power of disapproval free of judicial review, and the notice and hearing required by the statute would become an empty form. The Commission, free of the inhibitions imposed by the particular facts, would be left to roam the widest possible area of authority influenced and impelled only by its own doubts.

"Thus considered, it is apparent that the Commission has made its present order without reliance upon such evidence or findings as would warrant our affirmance."

4.

The Commission's Order Amounts to Retroactive Legislation Depriving the Respondents of Property Without Due Process of Law.

The retroactive feature of the Commission's present decision is particularly arbitrary. It is contrary to the fundamental tenets of American jurisprudence, and does violence to our sense of justice, that a person who acted in conformity with the law as it appeared at the time of his act, should later be penalized.

That the Commission now is well aware that prohibitions involving the promulgation of new policies should be prospective in their operation is shown by its recent handling of a similar problem in *Western Light and Telephone Company*, Holding Company Act Release No. 5902 (July 2, 1945) where a policy to preclude participation in competitive bidding by a person employed as financial adviser by the issuer was announced for the future, but was not applied in the case then under consideration. If the Commission had acted in the present case as it did in the *Western Light and Telephone* case it would have permitted the stock of the respondents to participate equally with other stock but would have announced a different policy for future cases. Instead the Commission created a prohibition, not hereto-

fore known to common law, equity, or statute, and applied it retroactively to these respondents alone.

Counsel for the Commission cite *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607 (1944), as sanctioning retroactivity. In that case, the retroactive order was decreed only because of the necessities of the situation. Thus the Court said:

> "* * * To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design." (p. 620)

And in the dissenting opinion we find:

> "Retroactivity is not favored in law. For this there are sound reasons, in some cases constitutional ones. Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139. There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may. Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *United States* v. *Heinszen & Co.*, 206 U. S. 370. Seldom if ever therefore may administrative or executive authority to apply it be inferred from legislation not expressly giving it. Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110 * * *." (p. 641)

Thus the Court was in agreement that "the law should avoid retroactivity as much as possible."

The Commission seeks to avoid criticism of the retroactive nature of its order by stating that:

> "... the decision of any case of first impression may have an effect not foreseen or foreseeable." (166).

Of course, courts are always applying principles of law and equity to new situations and are thus developing new principles. Such results are in fact reasonably foreseeable.

But that is not the situation here, for this Court has expressly held in this very case that no principle of common law or equity has been violated by the respondents. The Commission, as the body created by Congress to administer the Act, has a further power not granted to courts, the power to promulgate regulations of general application. In the words of this Court, the Commission may resolve "problems of policy" by "prohibitions unconcerned with the fairness of a particular transaction". The nature of such a regulation might not be foreseeable.

But such delegated power to resolve problems of policy is legislative. Where a new standard is to be created by the Commission, ordinary justice as well as a reasonable interpretation of the statute* requires that such a standard be put into effect by a regulation prospective in its operation, so that it will serve as a fair warning to such persons as may come within its provisions.

The recent Administrative Procedure Act, Pub. L. No. 404, 79th Cong., 2nd Sess. (June 11, 1946), is a manifestation of the concern of Congress that substantive rules be published before taking effect. By implication at least the enactment of this statute "To improve the administration of justice by prescribing fair administrative procedure" was a condemnation of retroactive action by administrative agencies.

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * * "

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* The general intent of Congress to avoid retroactivity is indicated in Section 20(d) of the Act, which says:

> " * * * No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

The preferred stock of these respondents was property protected by this Amendment, and an important attribute of that property was the contractual right held by the respondents, as against the corporation and the other stockholders, to be treated always on a parity with such other stockholders. This is the common law in Delaware, where the corporation was organized, *Eagleson* v. *Pacific Timber Company*, 270 Fed. 1008, as in other states, and is recognized by the federal courts. Fletcher, Cyc. Corp. (Perm. Ed.) Sec. 7296.

"Due process of law" is violated by arbitrary deprivation of property, or by arbitrary "taking of one man's property and giving it to another." *Ochoa* v. *Hernandez*, 230 U. S. 139, 161.

Here the order of the Commission arbitrarily takes the property of the respondents and gives it as a windfall to the surviving corporation. The Commission purports to act by reason of its power to determine whether the plan submitted met the tests imposed by Sections 7 and 11 of the Act, but in reality the Commission has exercised an assumed power to punish these respondents for acts which the Commission contends have violated a standard never before promulgated by the Commission or by any body, legislative or judicial.

The Commission's decision violates the Fifth Amendment by reason of its retroactive effect,* for it has repeatedly been held that neither the legislature nor the courts can change the law retroactively to the detriment of contractual rights.

Since the Commission purports now to be acting in its administrative capacity and as an arm of Congress, it is appropriate first to consider decisions relating to legislation. In many such cases statutes have been declared unconstitutional because they have retroactively affected

* The respondents assigned this as one of their points in the Court of Appeals (12), but the court did not find it necessary to pass on it.

property rights. *Ettor* v. *Tacoma,* 228 U. S. 148; *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142, mod. 276 U. S. 594; *Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582; *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189; *Wood* v. *Lovett,* 313 U. S. 362. Some of these decisions involved state legislation in violation of the Fourteenth Amendment, but the principle of violation of "due process" is the same.

A good example is *Treigle* v. *Acme Homestead Association, supra.* There a statute was held unconstitutional which abrogated the right of stockholders of a building association to have fifty per cent of the receipts of the Association set apart to pay withdrawing members. The new statute left the amount to the discretion of the directors. The Court said:

> "... Such an interference with the right of contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. . . (196)
>
> . . . .
>
> "As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law." (197, 198).

This language can well be applied to the present case, where the Commission has attempted to abrogate contract rights, lawful when acquired, under the guise of acting on a declaration filed pursuant to Section 7 of the Act.

Judicial decision also may be violative of the due process clause, if it overturns existing law which was relied upon

in the acquisition of property. Thus in *Gelpcke* v. *Dubuque,* 1 Wall. (68 U. S.) 175, it was contended that decisions of the State of Iowa which supported the validity of a bond issue, had been overruled by a later decision of that state. The Supreme Court held that rights acquired upon the strength of established judicial construction of a statute could not be lost by a new construction. The Court said:

> "*However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past.* 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.'
>
> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case." (Italics ours.)

To the same effect are *Havemeyer* v. *Iowa Co.*, 3 Wall. (70 U. S.) 294; *Olcott* v. *Supervisors*, 16 Wall. (83 U. S.) 678; *Douglass* v. *County of Pike*, 101 U. S. 677; *County of Ralls* v. *Douglass*, 105 U. S. 728; *Green Co.* v. *Conness*, 109 U. S. 104; *Muhlker* v. *N. Y. & Harlem Railroad Company*, 197 U. S. 544. See also Stimson *Retroactive Application of Law—A Problem in Constitutional Law*, 38 Mich. L. Rev. 30.

Certainly Congress has given the Commission no authority to make any order that has the effect of depriving these respondents of property without due process of law, and we contend that the Commission's order has that effect. Whether the Commission purports to act in an administrative, legislative, or judicial capacity, we contend that it has no power to enter such an order.

CONCLUSION.

The respondents therefore pray that the judgment of the United States Court of Appeals for the District of Columbia be affirmed.

Respectfully submitted,

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APPENDIX OF STATUTES.

Public Utility Holding Company Act of 1935.*

Sec. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * * * * * * * * *

Sec. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, * * *.

* * * * * * * * * *

(d) If the requirements of subsections (c) and (g) are satisfied,** the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

* * * * * * * * * *

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied,** the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

* * * * * * * * * *

* 49 Stat. 803, 15 U. S. C. Sec. 79.

** Subsections (c) and (g) are not material.

Sec. 11(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * * * * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

* * * * * * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commis-

sion shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * * * * * * *

Sec. 20(d) * * * No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.